Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-363

MICHAEL R. WOOD, dba NATIONAL PHOTO SERVICES,
Petitioner,

v.

CHACE COMPANY ADVERTISING, INC., a corporation, THOMAS CHACE, an individual; and BETTER BUSINESS BUREAU OF SANTA BARBARA, INC., a corporation, *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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JURISDICTION

The jurisdictional posture of this matter is not reflected correctly in the Petition. The fact is that this Court does not have jurisdiction in this matter because the Petition for Certiorari was not timely filed.

The Petition was filed in this Court on September 8, 1975. The Judgment which Plaintiff seeks to have reviewed in this Court was entered in the United States

Court of Appeals on April 21, 1975, which was 140 days prior to the filing of this Petition. 28 U.S.C. § 2101(c) requires that the Petition for Certiorari be filed "within 90 days after the entry of such judgment or decree," and the period for applying for a Writ of Certiorari has not, to our knowledge, been extended by a justice of this Court.

Petitioner attempts to avoid the effect of his failure to file timely by alleging that he seeks review of a certain post-judgment order entered July 9, 1975, and then expands that to two post-judgment orders in his discussion of "Jurisdiction" by including an earlier order entered on June 9, 1975.

It is apparently true that a timely Petition for rehearing would have tolled the running of the 90 day period for filing a Petition for Writ of Certiorari in this Court, but it is also true that "the filing of an untimely petition for rehearing which is not entertained or considered on its merits . . . cannot operate to extend the time for appeal." *Bowman* v. *Loperena,* 311 U.S. 262, 266.

Rule 40(a) of the Federal Rules of Appellate Procedure provides that "A Petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order." No order enlarging the time was made by the Court of Appeal. Consequently, the Petition for Rehearing should have been filed on or before May 5, 1975. Plaintiff's "Motion for Rehearing and Reconsideration of the Court's Order Dismissing the Appeal Under Rule 12C" was filed on May 12, 1975, which was obviously untimely.

The Court of Appeals, acting to the benefit of the Petitioner, construed Petitioner's Motion as a "Petition for Rehearing" and denied his Petition on June 9, 1975, "as untimely." In view of the fact that Petitioner's filing of the Petition for Rehearing was denied as untimely, the time for filing a Petition for Certiorari in this Court expired July 21, 1975. Therefore, the present Petition was clearly not filed within the 90 days stipulated by 28 U.S.C. § 2101(c) and Rule 22 of the Rules of the Supreme Court.

Petitioner subsequently filed a document entitled "Petition for Rehearing" on June 18, 1975, almost two months after the entry of the judgment dismissing his appeal. The Court of Appeals summarily denied that Petition on July 9, 1975, by the order Petitioner ostensibly seeks to have reviewed.

Petitioner complains that the Court of Appeals improperly considered his "Motion for Rehearing and Reconsideration" as a petition for rehearing instead of a motion under Rule 27(b) of the Federal Rules of Appellate Procedure. It is not clear what effect Petitioner thinks should have been given to that motion if it were to have been considered as a motion under Rule 27(b). The sole procedure provided under the Federal Rules of Appellate Procedure to request the Court of Appeals to modify its own judgment is a Petition for Rehearing. Therefore, it would appear to have been clearly to Petitioner's benefit for the Court of Appeals to construe his document as a petition for rehearing instead of a motion under Rule 27(b).

Furthermore, it is clear that Petitioner could not properly have filed a motion under Rule 27(b) under the particular circumstances of this case. Rule 27(b) contemplates the filing of a motion for reconsideration

of an action taken by the Court of Appeals when that Court has utilized the authority granted by Rule 27(b) to act upon a motion for a procedural order "without awaiting a response thereto" from the adverse party. Thus, a motion for reconsideration, which can be made by "any party adversely affected by such action", serves the office of allowing a party who has not theretofore been heard in opposition to a procedural motion to present his position on the subject of the motion to the Court of Appeals.

In the first place, appellees' Motion to Dismiss the appeal was not a "motion for a procedural order." That point is expressly covered in the "Notes of Advisory Committee on Appellate Rules" relating to Rule 27. Those notes state:

> "Many motions seek relief of a sort which is ordinarily unopposed or which is granted as of course. The provision of subdivision (a) which permits any party to file a response in opposition to a motion within 7 days after its service upon him assumes that the motion is one of substance which ought not to be acted upon without affording affected parties an opportunity to reply. A motion to dismiss or otherwise determine an appeal is clearly such a motion. . . ."

> "The term 'motions for procedural orders' is used in subdivision (b) to describe motions which do not substantially affect the rights of the parties or the ultimate disposition of the appeal. To prevent delay in the disposition of such motions, subdivision (b) provides that they may be acted upon immediately without awaiting a response, subject to the right of any party who is adversely affected by the action to seek reconsideration."

Thus, Petitioner's motion entitled "Motion for Rehearing and Reconsideration" is clearly not the type of motion contemplated under Rule 27(b).

Secondly, Petitioner did file a response to appellees' Motion to Dismiss the Appeal. Petitioner's Opposition Memorandum was filed on or about March 25, 1975, and the Court acted upon appellees' motion on April 21, 1975. Thus, Petitioner was not a party adversely affected by an action taken by the Court "without awaiting a response" to the motion. Therefore, the basic purpose for the type of motion authorized by Rule 27(b) clearly does not apply to the circumstances of Petitioner's erroneously captioned motion in the Court of Appeals.

The conclusion obviously is that the Court of Appeals properly acted to Petitioner's benefit by treating his "Motion for Rehearing and Reconsideration" as a Petition for Rehearing under Rule 40. Petitioner not only received procedural due process, but he was protected against an adverse application of procedural rules. Notwithstanding that beneficial treatment, however, Petitioner's Petition for Rehearing was not timely filed in the Court of Appeals and therefore the Petition for Certiorari was not timely filed in this Court.

QUESTIONS PRESENTED

Respondents do not agree that Petitioner's question No. 3 is an issue presented by the Petition. The U.S. District Court appointed the Special Master under Rule 53 of the Federal Rules of Civil Procedure. That Court's action had nothing whatsoever to do with the Federal Magistrates Act. The fact that the attorney appointed as Special Master to supervise discovery

proceedings in this matter happened to be a part-time United States magistrate was purely a coincidence and his duties as Special Master were entirely independent of, and unrelated to, his duties and authority as a U.S. magistrate.

Additionally, we note that questions 2 and 3 both relate to the judgment of the District Court and not to the judgment of the Court of Appeals. Under the posture of this case, neither of those procedural items would seem relevant. However, we have discussed them briefly to demonstrate that neither question has any merit.

STATUTORY PROVISIONS INVOLVED

For the reasons set forth above under "Questions Presented", Respondents disagree with the Petitioner's statement that construction of the provisions of the Federal Magistrates Act, 28 U.S.C. § 636(b)(2) is involved in this matter. As indicated, the cited statute has nothing to do with the case at bar.

STATEMENT OF THE CASE

Respondents have substantial disagreement with Petitioner's statements concerning the basic facts and substance of the underlying litigation. Petitioner's assertions in that respect do not even accurately reflect his own allegations. Nevertheless, Respondents will not present a lengthy discussion of the underlying litigation at this time because this Petition does not concern itself with the facts of the underlying case.

There are, however, several points purporting to be statements of fact in Petitioner's "STATEMENT OF THE CASE" which are simply not correct. For example, Petitioner asserts that "Petitioner was never able to

depose Thomas Chace by reason of dilatory and vexatious moves by him." (Petition, page 5). A reference to Appendix 2 of the Petition itself will establish that Petitioner's assertion is incorrect. The District Court judge, in his "Memorandum of Decision", states that "Also, in regard to the Chace deposition which commenced as scheduled on April 22, 1974, the Special Master reports that Mr. Wood refused to accept his instructions regarding procedures to be followed in taking the Chase deposition and repeatedly followed lines of questioning after appropriate objections had been sustained by him." (Appendix 2, *Memorandum of Decision and Order Dismissing Action,* page 5).

The trial judge did not terminate "all of petitioner's discovery," as incorrectly asserted by Petitioner. In fact, on Petitioner's Motion (Petition, Appendix 2 *Memorandum of Decision,* p. 4, line 10), which motion was also urged by Respondents, the District Court judge vacated an earlier order terminating discovery as to all parties and, among other things, ordered that Mr. Chace present himself for his deposition at a specified time. The District judge did not appoint the Special Master solely to "supervise Chace's deposition of Petitioner," but, on the contrary, the Special Master was appointed to supervise all discovery proceedings. The court acted on request of the Respondents because Petitioner continually refused to follow proper proceedings and persistently presented irresponsible motions relating to discovery which required Respondent's counsel to repeatedly travel approximately 100 miles to Los Angeles and 100 miles back again to Santa Barbara and to prepare and file numerous documents to respond to Petitioner's motions. The appointment of the Special Master was the only practicable method of dealing with Petitioner's con-

duct. The Petitioner ultimately concluded by making a mockery of the proceeding under the supervision of the Special Master.

Petitioner incorrectly asserts that the trial court "never attributes any disobedience to Petitioner . . . throughout the course of the proceedings." As a matter of fact, the District Court judge stated that "Specifically, Plaintiff failed to appear on April 15, 1974, at 10:00 a.m. as directed by this Court and did not appear until approximately 2:45 p.m. on that day. On the following day, Tuesday, April 16, 1974, Plaintiff's deposition was noticed for 8:30 a.m., but Plaintiff did not appear until 9:45 a.m." (Appendix 2, *Memorandum of Decision,* p. 5)

Petitioner states in his Petition that he had no notice that the deposition on Tuesday, April 16, 1974, was to commence at 8:30 a.m. That is flatly not true because the 8:30 a.m. starting time was set by the Special Master at the conclusion of the proceedings on Monday afternoon in the presence of Petitioner. Additionally, Petitioner's failure to produce the tape recordings which had become the subject of interrogation and which were in his possession as ordered by the Special Master, is only one example of Petitioner's "non-production of documents before the magistrate." In fact, throughout the deposition proceedings, Wood persistently failed to bring with him documents that had been ordered to be produced by the Special Master. Finally, Petitioner refused to produce documents when Respondents' attorneys went to Petitioner's apartment for inspection of documents in accordance with the Special Master's order which had been entered pursuant to stipulation between Petitioner and Respondents' attorneys. That refusal by Petitioner

to comply with the order precipitated the Respondent's motion to dismiss the action.

Finally, as far as Petitioner's "Statement of the Case" is concerned, it is not correct that the Respondents filed an "unrequested 'opposition brief' " relative to Petitioner's motion to reconsider. The Federal Rules of Appellate Procedure do not permit an opposition brief. What occurred was that Petitioner, at the same time that he filed his "Motion for Rehearing and Reconsideration," also filed an "Application for Extension of Time to File Brief." Appellees filed a "Motion for an Extension of Time in which to file Points and Authorities in Opposition to Appellant's motion for an Extension of Time to File Brief" and pointed out that Appellant's time in which to file his opening brief had expired no later than February 17, 1975, and that no extension of time for filing the brief had been granted by a judge of the Court of Appeals. In fact, Petitioner had done nothing relative to the brief until long after appellees had filed their motion to dismiss on March 21, 1975, more than one month after Petitioner was required to have filed his opening brief under the most favorable interpretation of the situation, and more than five months late under our understanding of the Rules of Appellate Procedure.

ARGUMENT

(1) The Court of Appeals Correctly Treated Petitioner's Motion as a Petition for Rehearing.

As we have previously discussed, the Court of Appeals acted favorably to Petitioner in treating his "Motion for Reconsideration" as a Petition for Rehearing. We will not repeat our previous observations at this point.

(2) Action Under Rule 37(b) Is Not Limited to Orders Made under Rule 37(a).

Petitioner erroneously contends that an order must be made under Rule 37(a) before the Court is authorized to take action under Rule 37(b). Rule 37(b) specifically grounds the Court's action upon failure to obey an order to provide or permit discovery, which is not necessarily an order under Rule 37(a). In fact, the rule specifically contemplates that orders other than orders under Rule 37(a) may be the ground for sanctions under Rule 37(b).

The foregoing is made clear by the rule itself. Rule 37(b)(2) states that "If a party . . . fails to obey an order to provide or permit discovery, *including* an order made under subdivision (a) of this Rule or Rule 35, the Court in which the action is pending may make such orders in regard to the failure as are just, ..." (emphasis added) Thus, the section itself simply requires as a prerequisite a failure to obey an order to provide or permit discovery.

In the case at bar, the Petitioner failed to obey an order entered by the District Court judge on April 1, 1974. That order was an express order to provide discovery and the District Court found that Petitioner wilfully disobeyed that order and the orders of the Special Master supervising discovery. Consequently, Petitioner's wilful failure to obey the District Court's order relative to discovery was an appropriate foundation for the District Court's action under Rule 37(b) and the District judge was clearly justified in making the order dismissing the action.

The cases to which Petitioner makes reference are not applicable to the case at bar. In fact, it is difficult

to perceive the reason for the citation of the case of *Dunlop Tire & Rubber Corp.* v. *Firestone Tire & Rubber Co.,* (1940) (D.C. Mass.), 1 F.R.D. 335. That case simply involved a motion to strike a defense that a patent was invalid because of lack of utility and inoperation. The defendant had answered an interrogatory to the effect that it could not state the reasons why the patent lacked utility and was inoperative. The District Court denied the motion, stating that the defendant could still rely on that defense at trial even though it could not spell out the reasons for the lack of utility and inoperative effect because of a lack of familiarity with the patent.

In the case of *Wembley, Inc.* v. *Diplomat Tie Company,* (1963) (D.C. Md.), 216 F. Supp. 565, the defendant had made a motion to strike certain evidence presented at the trial on the ground that the plaintiff had not disclosed the evidence in answers to interrogatories some two years prior to trial. The court denied the motion, observing that the sanction of prohibiting introduction of certain matters into evidence when withheld by a party in disregard of an order of the court compelling an answer applied only where a court order had been made. The court pointed out that where the discovery procedure is set in motion by the parties themselves *without* a court order, the party seeking discovery must first obtain an order before Rule 37(b) becomes applicable.

Obviously, the *Diplomat Tie Company* case is considerably different from the case at bar. In the case at bar, the discovery procedure was set in motion by an order issued by the District Court and it was for violation of that order that the District Court acted. The court did *not* say in the *Diplomat Tie Company* case

that relief under Rule 37(b) was confined to cases where a Rule 37(a) order had first been obtained.

In any event, Petitioner's contention in this respect is not properly a subject to be considered at this juncture because it has nothing to do with the review of the judgment of the United States Court of Appeals.

(3) The Special Master Was Not "Empowered To Make Ultimate Decisions on the Merits" and the Decision in the District Court Was Made by the Judge After a Full Hearing.

It is difficult to understand Petitioner's position in point C under "Reasons for granting the Writ." The order referring the matter to a Special Master under Rule 53 did not extend authority to Attorney McEwen to make "ultimate decisions on the merits," as asserted by Petitioner. The District Court simply referred the matter to the Special Master for the purpose of supervising discovery proceedings in a situation with an extended history of difficulties in discovery matters and with proceedings in a City approximately 100 miles from the court. The final judgment dismissing the case was made by District Judge Kelleher after a noticed hearing on an Order to Show Cause, with the Petitioner present in court at the time notice was given and with Petitioner participating in the final hearing. The sole function of the Special Master relative to that hearing was to present a sworn "Interim Report."

The case at bar bears no resemblance to the cases cited by Petitioner. In *Reed* v. *Board of Election Commissioners,* 459 F.2d 121 (1st Cir. 1972), the appellants appealed from denial of a Motion for Preliminary Injunction. The primary contention by appellants was that the hearing on the motion had been before a magistrate, who had filed a report to the judge stating that the case "had been heard on the merits."

The Court of Appeals pointed out that the magistrate's statement was clearly not correct inasmuch as the case had not been heard on the merits at that point. The court did observe that a magistrate had no authority to make a decision on the merits of a case and that a District Judge cannot simply adopt proposed findings of a magistrate on a "pro forma" basis without notice to the parties.

In the case of *T.P.O. Inc.* v. *McMillen,* 460 F.2d 348 (7th Cir., 1972), the trial court had referred a motion to dismiss a civil case to a magistrate for ruling. The Court of Appeals held that the magistrate could not be empowered to exercise ultimate adjudicating or decision making and that the District judge could not delegate such motions to the magistrate. The Court of Appeals issued a Writ of Mandamus directing the District Court to vacate the magistrate's order and directing the court to continue with the case in the due course of business.

Obviously the Special Master in the case at bar made no decision whatsoever on the merits of this case, and he was never empowered to make any decision on the merits. The final decision in the District Court was made by the District judge, which is strictly in accordance with the procedure stipulated in the *Reed* and *T.P.O., Inc.* decisions. The judgment dismissing Petitioner's case in the District Court was entered after the "de novo hearing and consideration by the judge of the District Court" requested by Petitioner, at which Petitioner was given a full opportunity to present his case.

It is also not correct to state, as Petitioner does, that the Special Master did any fact finding in the instant case. The Master simply filed a report to the judge concerning the events and occurrences which he him-

self had witnessed during the course of the discovery proceedings without any recommendation, finding of fact, or even proposed action. The report was a factual recitation of the occurrences within the personal knowledge of Mr. McEwen in his capacity as Special Master.

We have previously noticed the point that this case has nothing to do with the Federal Magistrates Act. We will not review that point again, and will simply note that this contention also is one that involved District Court action and not action by the Court of Appeals.

CONCLUSION

This Petition for Certiorari should be denied. Petitioner sets forth no valid contention which involves anything other than a routine, clearly established rule of law. Petitioner has had innumerable hearings before the Court of the United States, with a great deal more process than that which is his due. Petitioner's incredible abuse of the powers of the Courts of the United States should be brought to a close.

Respectfully submitted,

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